United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2077

To be argued by
MARC MARMARO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-2077

UNITED STATES OF AMERICA,

Appellee,

—v.—

LARRY STANLEY CROSSLEY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MARC MARMARO,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Larry Stanley Crossley appeals from an order entered on January 31, 1975 in the United States District Court for the Southern District of New York, per the Honorable Inzer B. Wyatt, denying Crossley's application pursuant to 28 U.S.C. § 1915 for an order directing the Government to provide him with transcripts of his arraignment and sentencing proceedings in Indictments 71 Cr. 697 and 71 Cr. 441.

Statement of Facts

Both Indictments charged appellant, in one count, with an armed robbery of a federally insured bank in violation of 18 U.S.C. §§ 2113(a) and 2113(d).

Appellant pleaded guilty to Indictment 71 Cr. 441 on June 18, 1971 and to Indictment 71 Cr. 697 on June 28,

1971, and on August 23, 1971 was sentenced to 15 years imprisonment on each charge, to run concurrently.

On February 9, 1973 appellant filed a "Motion for a full bill of particulars". This motion requested, *inter alia*, transcripts of his arraignment, plea and sentence. This motion was denied as "frivolous" by Judge Wyatt on February 9, 1973.

On January 31, 1975 appellant's affidavit and "motion to obtain documents in forma pauperis, pursuant to Title 28, United States Code, Section 1915" were filed. The supporting affidavit alleged that appellant was being held in custody in violation of his Fifth Amendment rights and stated that appellant needed the transcripts of his arraignment and sentencing proceedings to present his claim properly in an application pursuant to 28 U.S.C. § 2255.

Judge Wyatt denied this motion for lack of "any sufficient showing" on January 31, 1975.

Appellant next submitted an application (sworn to on February 14, 1975) which Judge Wyatt treated as a motion for leave to proceed on appeal in forma pauperis pursuant to Rule 24 of the Federal Rules of Appellate Procedure. Both the application and order of Judge Wyatt denying the application were filed on February 26, 1975. In his order dated February 25, 1975 denying appellant's motion, Judge Wyatt stated:

> "In his motion to obtain documents, petitioner sought to 'receive transcripts of his arraignment, and the sentencing proceedings', apparently so that he could use them to prepare a motion under the federal habeas corpus statute, 28 U.S.C. § 2255. Petitioner has not yet made a motion under 28 U.S.C. § 2255, has made no factual averments to suggest that he might be entitled to relief under that section, and therefore presented no ground for granting his request for transcripts."

Judge Wyatt stated that an appeal from his order denying appellant's motion under 28 U.S.C. § 1915 would not be taken in good faith.

On March 5, 1975 appellant's "motion for leave to proceed on appeal in forma pauperis" was filed in this Court. In his brief in support of such motion appellant alleged, *inter alia*, (1) that his sentencing proceedings were improperly delayed by the District Court and (2) that his guilty plea was involuntary. He stated that he intended to show from statements made by his attorney and the Government that his plea had been involuntary.

On May 14, 1975, this Court granted Crossley leave to prosecute the present appeal in *forma pauperis*.

ARGUMENT

POINT I

The District Court correctly required Crossley to make a showing of need before ordering the Government to provide to him, at its expense, the transcripts of his sentencing and arraignment proceedings.

In the absence of some showing of need an indigent federal prisoner is not entitled to transcripts of prior proceedings to aid him in preparing a petition under 28 U.S.C. § 2255.* *See, e.g., United States* v. *Herrera*, 474

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* Appellant's District Court motion was grounded on 28 U.S.C. § 1915. Section 1915 does not by it's terms apply to an individual seeking a transcript for the purpose of preparing an application under 28 U.S.C. § 2255. Rather, section 1915(b) is limited to the furnishing of records on appeal.

Similarly, 28 U.S.C. § 753(f) is of no assistance to Crossley. That section provides in pertinent part:

[Footnote continued on following page]

F.2d 1049 (5th Cir.) (per curiam), *cert. denied*, 414 U.S. 861 (1973); *Doyal* v. *United States*, 456 F.2d 1292 (5th Cir. 1972) (per curiam) (appeal from dismissal of § 2255 petition); *Cowan* v. *United States*, 445 F.2d 855 (5th Cir. 1971) (per curiam); *Brown* v. *United States*, 438 F.2d 1385 (5th Cir. 1971) (per curiam); *Bennett* v. *United States*, 437 F.2d 1210 (5th Cir. 1971) (per curiam); *Skinner* v. *United States*, 434 F.2d 1036 (5th Cir. 1970) (per curiam); *Bentley* v. *United States*,* 431 F.2d 250 (6th Cir. 1970), *cert. denied*, 401 U.S. 920 (1971); *Walker* v. *United States*, 424 F.2d 278 (5th Cir. 1970) (per curiam); *Hoover* v. *United States*, 416 F.2d 431 (6th Cir. 1969) (order); *Benthiem* v. *United States*, 403 F.2d 1009 (1st Cir. 1968) (per curiam), *cert. denied*, 396 U.S. 945 (1969); *United States* v. *Shoaf*, 341 F.2d 832 (4th Cir. 1964); *Dorsey* v. *United States*, 333 F.2d 1015 (6th Cir. 1964) (order), *cert. denied*, 379 U.S. 994

> "Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose *if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal*" (emphasis added).

Since appellant has not yet instituted a proceeding under section 2255, section 753(f) is not relevant to this matter. *See Dorsey* v. *United States*, 333 F.2d 1015 (6th Cir. 1964) (order), *cert. denied*, 379 U.S. 994 (1965); *Ketcherside* v. *United States*, 317 F.2d 807 (6th Cir. 1963) (per curiam), holding that a federal prisoner is not entitled under either 28 U.S.C. §§ 753(f) or 1915 to obtain transcripts at Government expense for the purpose of preparing a section 2255 application.

* While the Sixth Circuit in *Bentley* stated that giving an indigent an unqualified right to a free transcript to prepare a 2255 petition would "at least theoretically" advance equal protection and due process, the court, mindful that the Supreme Court had reserved its judgment of the issue in *Wade* v. *Wilson*, 396 U.S. 282 (1970), decided to retain its requirement that an indigent make a prior showing of need. 431 F.2d at 253-54.

(1965); *Ketcherside* v. *United States*, 317 F.2d 807 (6th Cir. 1963) (per curiam). *But see*, *MacCollom* v. *United States*, 511 F.2d 1116 (9th Cir. 1974). Federal Courts of Appeals have consistently applied the same rule in the case of state prisoners seeking federal habeas corpus relief. *See, e.g., Jones* v. *Superintendent, Virginia State Farm*, 460 F.2d 150 (4th Cir. 1972), *cert. denied*, 410 U.S. 944 (1973); *Ellis* v. *State of Maine*, 448 F.2d 1325, 1327 (1st Cir. 1971); *Colbert* v. *Beto*, 439 F.2d 1130 (5th Cir. 1971) (per curiam); *Chavez* v. *Sigler*, 438 F.2d 890 (8th Cir. 1971); *Hines* v. *Baker*, 422 F.2d 1002 (10th Cir. 1970).

The one contrary decision, *MacCollom* v. *United States*, *supra*, was the decision of a divided court. *Id.* at 1124 (Taylor, *J.*, dissenting). Moreover, five circuit judges, in dissenting from an Order Denying Petition For Rehearing En Banc, *id. at* 1125, opposed the panel majority's opinion on the merits. Thus, of the twelve judges then sitting on the Ninth Circuit, seven have specifically addressed themselves to the merits of this issue, and five have concluded that the split-panel decision was "wrong on the merits". *Id.* at 1125. The remaining judges merely voted to deny *en banc* consideration without stating their substantive views. This does not indicate that those judges agreed with the panel majority's opinion, but only that for some reason they felt that the *MacCollom* case did not merit *en banc* review. *See United States* v. *Puco*, 476 F.2d 1099, 1108, 1109-10 (2d Cir.) (Lumbard, *J.*, dissenting),* *cert. denied*, 414 U.S. 844 (1973).

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* In *Puco*, Judge Lumbard stated:

"The fact that only Chief Judge Friendly and Judges Hayes and Timbers voted to en banc this case by no means implies that a majority of the active judges approve the panel opinion; I know from experience how difficult it is to persuade a majority of the acting judges of a busy court to agree to en banc consideration, where they believe the panel has reached the right result simply because they disagree with the opinion." 476 F.2d at 1110.

Appellant contends that he is entitled to transcripts from his arraignment and sentencing proceedings as a matter of right without being required to make a prior showing of need so that he can prepare a section 2255 application. In advancing this argument Crossley is seeking an expansion of the rule developed by *Griffin* v. *Illinois*, 351 U.S. 12 (1956), and its progeny to reach a result which is supported by neither constitutional principles nor the weight of federal precedent.

There is no constitutional requirement that an indegent receive without cost all of the services which a wealthier counterpart could purchase if he so desired. *See Ross* v. *Moffitt*, 417 U.S. 600, 616 (1974); *MacCollom* v. *United States*, *supra* at 1125-26 (Opinion of Wallace, *J.*, dissenting from Order Denying Petition For Rehearing En Ban, in which dissent four other Circuit Judges concurred, 1975); *Walle* v. *Sigler*, 456 F.2d 1153, 1156 (8th Cir. 1972) (holding that an indigent state defendant is not entitled to a daily trial transcript); *Slawek* v. *United States*,* 413 F.2d 957, 960 (8th Cir. 1969) (Blackmun, *J.*). The test is whether an indigent has been accorded "an adequate opportunity to present his claims fairly". *Ross* v. *Moffitt*, *supra* at 616. Moreover, this Court—in reversing the grant of a writ of habeas corpus premised on the failure of the state to provide to the indigent petitioner the transcript of a pretrial suppression hearing—said that "[n]ot every denial of a free transcript to an indigent results in a denial of equal protection of the laws." *United States ex rel. Cadogan* v. *LaValle*, 428 F.2d 165, 167 (2d Cir. 1970), *cert. denied*, 401 U.S. 914 (1971).

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* The court in *Slawek* noted in response to appellant's contention that the trial court should have granted him money to subpoena witnesses:

> "[A] rich defendant may have the right to waste his money on unnecessary and foolish trial steps, but that does not, in the name of necessary constitutional equality give the indigent the right to squander government funds merely for the asking." 413 F.2d at 960.

While in situations involving direct appeals, no showing of need is required, there is clearly a distinction between direct and collateral attacks on convictions which would justify denying a transcript in collateral review proceedings. On direct appeal there are a myriad of questions which are not reviewable in a collateral proceeding. Consequently, the use of a transcript is a necessary starting point for a lawyer. *See United States* v. *Shoaf, supra.* In collateral proceedings, however, the issue is whether there has been a deprivation of constitutional rights. It is not the Government which institutes this proceeding, but the petitioner. If such a deprivation of constitutional rights existed, there is a far greater chance that a litigant would recall with some specificity the nature of the deprivation. *See MacCollom* v. *United States, supra* at 1125 (Taylor, *J.*, dissenting); *Ellis* v. *State of Maine, supra* at 1327; *Bentley* v. *United States, supra; Smith* v. *United States,** 421 F.2d 1300 (6th Cir. 1970) (per curiam); *United States* v. *Shoaf, supra; cf. Leslie* v. *Matzkin,* 450 F.2d 310, 312 (2d Cir. 1971), in which this Court stated that an indigent litigant could only receive a free transcript of a probable cause hearing when such a transcript was "*needed* to vindicate legal rights." If indigent prisoners were not required to make a showing of need for a transcript, they would be able, in effect, to comb through the record to search for the mere possibility of constitutional error. Such a rule would place " . . . the indigent in a more favorable position

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* In denying a request similar to Crossley's, but in a somewhat different factual context, the court in *Smith* said:

> "In general, indigents are not accorded a right to a free transcript. The basis of this rule being to prevent the wasting of court time on frivolous appeals. It is assumed that, absent special circumstances, a man in custody, can recall sufficiently the circumstances of a non-frivolous error to frame an appropriate motion to vacate sentence." 421 F.2d at 1301.

than the average defendant who pays his own way." *MacCollom* v. *United States, supra* at 1126 (Wallace, *J.*, dissenting from Order Denying Petition for Rehearing *En Banc*).

The narrow issue presented by this appeal has never been decided by the Supreme Court.* *See Wade* v. *Wilson*, 396 U.S. 282, 286 (1970). Moreover, recent Supreme Court opinions indicate that there are limitations on the amount of legal services the federal and state governments are constitutionally mandated to provide to indigents. *See Britt* v. *North Carolina*, 404 U.S. 226, 227 (1971), where the Court, commenting on the *Griffin* line of cases, stated that the "outer limits" of the *Griffin*-principle were not yet clear. Indeed, the latest Supreme Court decision in this area resulted in the denial of a claim made by an indigent state defendant.

The issue in *Ross* v. *Moffitt, supra*, was whether North Carolina was obligated to supply an indigent de-

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* While the Supreme Court has decided many cases involving an indigent's right to a transcript, all such cases are distinguishable from the issue presented in the instant case. In *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971), *Williams* v. *Oklahoma City*, 395 U.S. 458 (1969) (per curiam), *Draper* v. *Washington*, 372 U.S. 487 (1963), *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 (1958) (per curiam) and *Griffin* v. *Illinois, supra*, the issue concerned the right to a transcript for appeal purposes. *Gardner* v. *California*, 393 U.S. 367 (1969) and *Long* v. *District Court of Iowa*, 385 U.S. 192 (1966) (per curiam) involved requests for transcripts of habeas corpus hearings for use in an appeal (or, in the case of *Gardner*, a new proceeding which was the functional equivalent of an appeal) from the denial of the writ. In *Roberts* v. *LaVallee*, 389 U.S. 40 (1967) (per curiam), the Court held that an indigent state defendant had the right, prior to trial, to have a transcript of a prior preliminary hearng at which major state witnesses had testified. Finally, *Hardy* v. *United States*, 375 U.S. 277, 282 (1964), dealt with the right to a transcript on appeal and was decided on statutory and not constitutional grounds.

fendant with appointed counsel (1) in a discretionary appeal to that State's Supreme Court and (2) in preparing an application for review in the United States Supreme Court. In reversing the Fourth Circuit's decision holding that the State must provide such services, 483 F.2d 650 (1973), the Court examined both the due process and equal protection rationales for the *Griffin* and *Douglas* v. *California*, 372 U.S. 353 (1963) (holding that an indigent was entitled to appointed counsel on his first appeal as of right) line of cases. The Court noted that '"[d]ue process' emphasizes fairness between the State and the individual dealing with the State regardless of how other individuals in the same situation may be treated" and held that the denial of appointed counsel in the case before it did not violate due process. 417 U.S. at 609-11.

In analyzing the equal protection claim the Court indicated that the inquiry must be directed towards determining whether there is "disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable", *id.* at 609, and said that "[t]he question is not one of absolute but one of degrees." *Id.* at 612. While the Court conceded that use of a lawyer on discretionary review might well be helpful, denial of an appointed lawyer in such circumstances was not a denial of equal protection. In rejecting the contention that the State had to provide counsel in preparing an application for review in the United States Supreme Court, the Court noted that much of the same analysis applied. In addition, the Court observed that it had consistently refused to require the Federal Government to provide counsel for individuals seeking to file jurisdictional statements or petitions for certiorari. *See, e.g., Oppenheimer* v. *California*, 374 U.S. 819 (1963); *Mooney* v. *New York*, 373 U.S. 947 (1963); *Drumm* v. *California*, 373 U.S. 947 (1963). Conse-

quently, the Supreme Court has held that a state does not automatically deny an indigent litigant either due process or equal protection by not giving him all the services to which his wealthier counterpart has access.

The Government respectfully submits that in view of the Supreme Court's decision in *Ross* v. *Moffit*, *supra*, and the overwhelming weight of federal appellant precedent, this Court should affirm the District Court's holding that a federal prisoner does not have an absolute right to a transcript of prior proceedings for use in preparing a petition pursuant to 28 U.S.C. § 2255, but must make at least some minimal showing of need.

POINT II

The District Court correctly found that Crossley had failed to make any showing sufficient to require that he be provided, at government expense, with the transcripts of his arraignment and sentencing proceedings.

In his motion before the District Court appellant simply alleged that he was being held in violation of his Fifth Amendment rights. In his motion for leave to appeal to this Court, appellant did not measurably elaborate on his earlier claim. He merely claimed that he intended to prove that his plea was involuntary and that his sentencing improperly delayed. Even assuming that the contentions made in appellant's application to this Court may properly be considered in determining whether a showing of need has been made, appellant has merely made the bald allegation that the remarks of his attorney and of the Government's attorney would show his plea to have been involuntary. No factual allegations have been made which if true might provide a basis for

relief and appellant in no way alleges in what manner his plea was involuntary. Appellant has not even alleged that he cannot remember his arraignment and sentencing proceedings well enough to frame an adequate request. His statement that he needs the transcript to demonstrate his claim by remarks made by his and the Government's attorneys is merely the bootstrapping of one unsupported allegation by another. Obviously, anyone requesting a transcript hopes to ground his claim on remarks made by some of the participants.* Appellant has simply not shown how the transcript of his arraignment (or guilty plea) would help him establish that his plea had been involuntarily made and his request should therefore be denied.

Appellant's allegations concerning his sentencing are also insufficient. Appellant has not revealed how he expects the transcript of his sentencing to show that the Dis-

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* Moreover, appellant has requested transcripts of his arraignment and sentencing only and not of his guilty plea proceedings. While perhaps pro se litigants should not normally be required to state their claims with the same specificity required of other litigants, in this case the Court would be justified in refusing to treat appellant's request as a request for his plea proceedings. This is because in an earlier petition before the District Court appellant specifically requested, *inter alia*, "the transcript of arraignment, the transcript of plea, and the transcript of sentence." *See* Appellant's Appendix E, Motion For Full Bill of Particulars In The Above Numbered Cause, dated February 7, 1973. In this case it is not appellant who has requested transcripts of his guilty pleas, but counsel, who has made this request for the first time in his brief to this Court. *See* Brief for Appellant at 2.

In Indictment 71 Crim. 441 appellant changed his plea from not guilty to guilty. Indictment 71 Crim 697 originated in the Northern District of Illinois and was transferred to the Southern District of New York for plea and sentence pursuant to Fed. R. Crim. P. 20. Even assuming that a request for an arraignment transcript in Indictment 71 Crim. 697 could be interpreted as a request for a transcript of plea proceedings, there is no way a request for a transcript of the arraignment in Indictment 71 Crim. 441 can be so interpreted.

trict Court improperly delayed his sentencing so as to coerce his testimony before a grand jury. The docket sheet indicates that appellant's guilty pleas were entered on June 18 and 28, 1971, respectively, and his sentencing for both Indictments was on August 23, 1971. The period between plea and sentencing hardly seem extraordinary. Thus, in the absence of some showing of need, this request should also be denied.

In his application before the District Court appellant merely asserted a boilerplate Fifth Amendment claim to support his request. In no way did he state how he expected the transcripts to be useful. This clearly is not a sufficient basis on which to ground a request for transcripts, and Judge Wyatt properly so found. Moreover, even if this Court were to consider matters alleged in appellant's motion for leave to proceed on appeal in forma pauperis as germane to his District Court application, the Government respectfully submits that appellant still has not made a sufficient showing to justify his request for transcripts of his arraignment and sentencing proceedings.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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MARC MARMARO,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

LARRY STANLEY CROSSLEY,

Appellant.

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AFFIDAVIT OF MAILING

Docket No. 75-2077

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARC MARMARO, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 22nd day of September, 1975, he served two copies of the within Brief by placing the same in a properly postpaid franked envelope, addressed as follows:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
Foley Square
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, New York, New York 10007, Borough of Manhattan, City of New York.

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977

Mary L. Avent

Sworn to before me this
22nd day of September, 1975

Marc Marmaro

MARC MARMARO
Assistant United States Attorney